90-810

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ROLAND C. DART, III, JIM JAKSCH,
ROBERT LEWIS, THOMAS HAUSER and
CITY OF VALLEJO,
Petitioners,

VS.

JAMES FORRESTER,
Respondent.

**On Petition for a Writ of Certiorari to
The United States Court of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a California Tort Claims Act provision, Government Code Section 945.3, is applicable to federal civil rights actions filed pursuant to 42 U.S.C. 1983.

2. Whether the Court of Appeals for the Ninth Circuit improperly severed California Government Code Section 945.3.

3. Whether a former police officer arrested during an undercover drug operation may pursue a civil rights claim against his former municipal employer after the limitation period has run, in reliance on a tolling subsection of a California Tort Claims Act provision that the California Legislature enacted to prevent mischievous lawsuits by criminal defendants while their criminal charges are pending.

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on July 23, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in Appendix A. The recent Ninth Circuit opinion relied upon by the Court of Appeals, *Harding v. Galceran,* is reported at 889 F.2d 906 (9th Cir. 1989).[1]

[1] *Harding* has a pending petition for writ of certiorari (No. 89-1772) and brief of amicus curiae in support of the petition. The brief of amicus

The memorandum of decision and order of the United States District Court for the Northern District of California (Henderson, J.) granting petitioners judgment on the pleadings is reprinted in Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on July 23, 1990. By Order dated September 24, 1990, this Court extended petitioners' time for filing a petition for writ of certiorari to and including November 20, 1990. The Order is reprinted in Appendix C.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, article VI, clause 2:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves the following subsections of the California Tort Claims Act of 1963, California Government Code Section 945.3:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in

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curiae was filed by the petitioners herein on behalf of the League of California Cities.

investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

STATEMENT OF THE CASE

At the time of his arrest during an undercover drug operation, plaintiff James Forrester ("Forrester"), a former Vallejo police officer, was in the company of Alfred Cruz, another former Vallejo police officer. Cruz had been discharged from the Vallejo police force the previous year after he was charged with criminal drug offenses. They were in the company of David Paiva, a recently released prisoner.[2]

At some point during their drive from Vallejo to Napa, Paiva became anxious and opened the car door to get out. He was grabbed by Forrester and pulled back into the car. Cruz grabbed Paiva's shoulder and produced a knife. He started questioning Paiva about how long he had been working as an informant.

Cruz then started shoving $2,000 in Paiva's face and throwing it out the car window. Forrester stopped at a stop sign and backhanded Paiva in the stomach and the face. Forrester said "Don't cut him;" "Don't cut him yet;" or "Don't cut him yet, Eddie." When the three men arrived in Napa, Cruz and Forrester were arrested. Forrester was charged with kidnap, assault with a deadly weapon, conspiracy, robbery, grand theft and dissuading a witness.

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[2] Mr. Paiva is listed as a defendant in the caption of the complaint but he made no appearance in the District Court or in the Court of Appeals for the Ninth Circuit. The recited facts are taken directly from Forrester's allegations in his complaint and were recounted in the briefs in the District Court and the Ninth Circuit.

Forrester's arrest occurred on January 7, 1987. Under the applicable statute of limitations, Forrester had one year to file his civil rights action under 42 U.S.C. Section 1983. Forrester filed his civil rights claim against the City of Vallejo, its Chief of Police and three Vallejo police officers ("City") eighteen months later, on July 18, 1988, alleging illegal arrest, excessive use of force, abuse of process and malicious prosecution under Section 1983 and California law. The District Court granted City's Rule 12(c) motion for judgment on the pleadings on May 2, 1989, holding in pertinent part that Forrester's Section 1983 claim was barred by the statute of limitations.[3] In response to Forrester's assertion in the District Court that the time to file his federal civil rights claim was tolled by a California Tort Claims Act provision, Government Code Section 945.3, the Court ruled, *inter alia,* that "plaintiff was not required to delay his Section 1983 claim until criminal charges against him were dismissed on October 22, 1987. Since he was not subject to the restriction of Section 945.3, he cannot make use of its tolling clause." (Order at App. B, p. 5.)

Forrester appealed to the Ninth Circuit; the matter was briefed and awaiting oral argument when the Ninth Circuit issued its decision in *Harding v. Galceran, supra,* on November 16, 1989. *Harding* severed California Government Code Section 945.3. The Ninth Circuit struck down Section 945.3's denial of access to court under the Supremacy Clause, but upheld the tolling subsection of Section 945.3 and applied it to federal civil rights actions. The City filed an amicus brief in *Harding* in support of the County of Los Angeles' petition for rehearing with suggestion for rehearing en banc. The Ninth Circuit denied the petition.

The County of Los Angeles then filed a petition for a writ of certiorari in *Harding* (No. 89-1772). Because both *Harding* and

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[3] Forrester's pendent state claims were also dismissed in light of the disposition of the federal claims. Independent grounds exist and were argued that compel dismissal of the pendent state claims. Forrester failed to plead compliance with the mandatory claim requirements for all state law actions against public entities. The District Court and the Ninth Circuit did not reach this issue because of the disposition of the federal claims.

the instant case are of interest to all California cities, the Board of Directors of the League of California Cities recommended that all California cities support the petition for writ of certiorari in *Harding*. Petitioners herein filed a brief of amicus curiae in support of the petition for writ of certiorari. Shortly thereafter, the Ninth Circuit reversed the District Court in the instant matter in light of its decision in *Harding*. The City, therefore, submits this petition for the Court's consideration.[4]

REASONS FOR GRANTING THE WRIT

I

SUMMARY OF ARGUMENT

California Government Code Section 945.3 is not a tolling statute. It is a California Tort Claims Act anti-mischief statute. Section 945.3 is surely not California's coordinate tolling rule for Section 1983 actions.

The Ninth Circuit improperly severed Section 945.3. The mandatory stay on filing actions while criminal charges are pending is not severable from the provision extending the statute of limitations. This Court has established a rule of severability when certain parts of a statute are unconstitutional. Where it is not possible to separate the unconstitutional part from the rest, as here, the whole statute must fall. Partial invalidation is improper where it would be contrary to legislative intent. The key inquiry is whether the Legislature would have passed the constitutional part of the statute had it known that the rest was invalid. Section 945.3 must fall in its entirety because the California Legislature simply

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[4] The City respectfully invites the Court's attention to the petition for writ of certiorari and the City's brief of amicus curiae filed with the Court in *David Galceran and Ed Peel v. Edward Joseph Harding* (No. 89-1772). The City adopts the arguments set forth in the petition for writ of certiorari and the brief of amicus curiae and incorporates the same herein by reference. The City respectfully suggests that the petition in *Harding* and the instant petition be considered together as related cases posing the identical question to the Court.

would not have enacted the valid part had it known the rest would fail to pass constitutional muster.

II

CALIFORNIA GOVERNMENT CODE SECTION 945.3 IS AN ANTI-MISCHIEF STATUTE AND NOT A TOLLING STATUTE

Section 945.3 does not apply to federal civil rights actions. Relying on several Supreme Court decisions in a case of first impression, the District Court, in *Mangels v. County of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988), reasoned that Section 945.3 is inconsistent with important policies underlying federal civil rights actions, citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975). Rejecting the plaintiff's suggestion to sever the statute, the District Court struck down Section 945.3 in its entirety. The Ninth Circuit, however, has ignored the sound reasoning of *Mangels*, cut the statute in half and improperly applied the tolling subsection of Section 945.3 to federal civil rights actions.

The California Legislature enacted Section 945.3 in 1981 as an anti-mischief statute.[5] The legislative history establishes that its purpose was to eliminate the use of civil damage complaints as plea bargaining levers. The Legislature concluded that "many criminal defendants filed frivolous suits against officers involved in their prosecution, then used the suits as bargaining chips in plea negotiations." *McAlpine v. Superior Court*, 209 Cal.App.3d 1 (1989). Section 945.3 was also intended to prevent the use of false arrest suits as a device to inquire into prosecutorial materials and investigative information while criminal charges are pending. *Mohlman v. City of Burbank*, 179 Cal.App.3d 1037, 1042 (1986); *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848 (1988).

Section 945.3 of the California Tort Claims Act denies litigants access to court on *state* law claims. As an integral part of the Tort

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[5] Senate Bill No. 511 (Cal. Stats. 1981, Ch. 285) was sponsored by Senator Ed Davis, the former Chief of Police for the City of Los Angeles.

Claims Act, Section 945.3 is inconsistent with 42 U.S.C. Section 1983. Courts should not apply inconsistent tort claims provisions to Section 1983 actions. *Board of Regents v. Tomanio,* 446 U.S. 478, 485 (1980); 42 U.S.C. 1988. The purposes underlying the Tort Claims Act and Section 1983 are undeniably distinct. "The State scheme . . . was conceived to *strictly limit governmental liability;* the federal legislation, by contrast, was designed to ensure an adequate remedy for violations of civil rights." *Williams v. Horvath,* 16 Cal.3d 834, 842 (1976). [Emphasis added.] Section 945.3 effectively furthers California's interest in protecting itself from liability and its processes from interference. Section 945.3 of the Tort Claims Act is antithetical to the remedial purpose of 42 U.S.C. Section 1983.

The Ninth Circuit has mischaracterized Section 945.3 as a tolling statute. It is not. It contains a subsection that postpones the accrual of the cause of action or, alternatively, suspends the running of the period in which to commence suit on the accrued cause of action. (See *3 Witkin, California Procedure, 3d Edition, Actions,* Section 502 at p. 528.) This subsection has a specific purpose: to provide those persons temporarily barred by Section 945.3 from pursuing *state* law claims with additional time to file them.

This Court, in *Hardin v. Straub,* 490 U.S. ____, 109 S.Ct. 1998 104 L.Ed.2d 582, 588 (1989), held that the limitations period in Section 1983 suits is to be determined by reference to the appropriate state statute of limitations and the *coordinate tolling rule.* The Court noted in *Hardin* that California's coordinate tolling rule is Code of Civil Procedure Section 352. *Id* at 589, fn 8. Section 945.3 is not California's coordinate tolling rule and is not applicable to federal civil rights actions.

III

THE NINTH CIRCUIT IMPROPERLY SEVERED CALIFORNIA GOVERNMENT CODE SECTION 945.3

Where certain parts of a statute are held to be unconstitutional, the validity of the rest depends on whether the Legislature intended the statute to be severable. If so, the objectionable

portions are void, and the rest of the act is valid. Where, as here, to sustain the remaining valid portion would accomplish a result different from that intended by the California Legislature, the whole must be declared invalid. In this case, California Government Code Section 945.3 is invalid in its entirety as it applies to Section 1983 actions. To hold otherwise would accomplish a vastly different result from that intended by the California Legislature.

This Court's standard for determining the severability of an unconstitutional provision focuses on the intent of the Legislature. "Partial invalidation would be improper if it were contrary to legislative intent in the sense that the Legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985). The Court was addressing, as here, the standard for a federal court to apply when considering the severability of a state statute.

The Court explained that "[t]his standard is similar to that which we apply in determining the severability of a federal statute: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " [*supra*, at 506, fn. 5], citing *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n.*, 286 U.S. 210, 234 (1932). This Court's standard for determining the severability of an unconstitutional provision is well established: it is largely a question of legislative intent. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984).

It is indisputable that the Ninth Circuit in *Harding* and the decision below severed California Government Code Section 945.3. "Accordingly, as applied here, the prohibition in paragraph 1 of Section 945.3 must fall under the Supremacy Clause. . . . It does not necessarily follow that the one year statute of limitations for Section 1983 actions should not be tolled by the tolling rule expressed in Section 945.3. . . . [paragraph] Therefore, the tolling provision does not fall under the Supremacy Clause and should

have been applied to Harding's Section 1983 claims against the deputies." *Harding v. Galceran, supra.* Subsequently, the Ninth Circuit held that "[a]fter the District Court's decision in this case, we held in *Harding v. Galceran* [citation omitted] that the tolling rule set forth in Cal. Gov't Code Section 945.3 tolls the one year statute of limitations for Section 1983 actions. *Harding* controls this case and requires reversal of the judgment dismissing plaintiff's claims as time barred." Memorandum, (App. A-2).

It is equally indisputable that the Ninth Circuit did not apply this Court's rule regarding severability. The Court below did not even discuss the issue of severability.[6] The City respectfully submits that the failure to apply this Court's standard for determining severability renders the decision below fatally defective. A writ of certiorari should, therefore, issue to review the decision below.

If the Ninth Circuit had correctly applied this Court's standard for determining severability, Section 945.3 would undoubtedly have fallen in its entirety. As set forth above, the relevant inquiry is legislative intent. "The legislative history established that the purpose of Section 945.3 was to 'eliminate the use of civil damage complaints as plea bargaining levers.' [*Mohlmann v. City of Burbank, supra,* quoting *Assembly Office of Research Mem.* dated July 10, 1981.] Section 945.3 was designed to eliminate such problems, not to give civil rights plaintiffs more time to file.

The California Legislature's intent is evident. The Legislature would not have extended the statute of limitations independent of the temporary denial of access to court. The two provisions are inextricably intertwined, with the former entirely dependent on the latter. There is no evidence nor any reason to believe that the Legislature intended to give Section 1983 plaintiffs more time to file their complaints. To the contrary, the California Legislature's intent was to limit mischievous lawsuits by criminal defendants. The California Legislature's intent is also clear with respect to tolling. The relevant California tolling doctrine is found in Cali-

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[6] The City raised the issue of severability in its amicus brief in support of the petition for rehearing in *Harding.* The Ninth Circuit denied the petition without comment.

fornia Code of Civil Procedure Section 352. Any other conclusion is plainly inconsistent with the intent of the California Legislature.

The first published opinion considering this important issue observed that the plaintiff "appears to maintain that the tolling clause contained in Section 945.3 constitutes a distinct tolling rule upon which he may rely, notwithstanding the Court's holding that Section 945.3 does not apply to this action. The argument is unsound . . . plaintiff may not prevail upon Section 945.3's tolling clause without having been subject to its disabilities. To hold otherwise would permit words and phrases to be plucked from statutes as if they existed in a vacuum." ***Mangels, supra.*** Judge Rea found support for this position from Judge Learned Hand: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." ***Mangels, supra,*** citing ***N.L.R.B. v. Federbush Co., Inc.,*** 121 F.2d 954, 957 (2nd Cir. 941).

In conclusion, the City agrees with the Ninth Circuit in *Harding* and the instant matter to the extent that Section 945.3 must fall under the Supremacy Clause. The whole statute, however, must fall rather than merely one nonseverable part. The decision below is analytically unsound and inconsistent with the dictates of this Court.

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari be granted.

DATED: November 19, 1990.

Respectfully submitted,

JOHN M. POWERS
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Attorneys for Petitioners

* Counsel of Record

Appendix A

Not For Publication

United States Court Of Appeals
For the Ninth Circuit

James Forrester,
Plaintiff-Appellant,

v.

Roland C. Dart, III; Jim Jaksch; Robert Lewis;
Thomas Hauser; City of Vallejo,
Defendants-Appellees.

[Filed Jul 23, 1990]

No. 89-15723

D.C. No. CV-88-2818-TEH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Sumitted July 18, 1990**
San Francisco, California

Before: TANG, NOONAN, and RYMER, Circuit Judges

James Forrester appeals the district court's entry of judgment on the pleadings in his action under 42 U.S.C. § 1983. The district court found that his claims of illegal arrest, excessive force, and abuse of process are barred by the statute of limitations, and that his malicious prosecution claim is not cognizable under *Cline v. Brusett*, 661 F.2d 108 (9th Cir. 1981). We reverse and remand.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Forrester's complaint was filed more than one year after the events giving rising to the claims arose, but within one year of the termination of criminal proceedings against him. After the districts court's decision in this case, we held in *Harding v. Galceran,* 889 F.2d 906 (9th Cir. 1989) that the tolling rule set forth in Cal. Gov't Code § 945.3 tolls the one-year statute of limitations for section 1983 actions. *Harding* controls this case and requires reversal of the judgment dismissing plaintiff's claims as time barred.

The district court dismissed Forrester's malicious prosecution claim because no facts were alleged indicating that he was subjected to an intentional denial of equal protection or constitutional rights. Plaintiff's complaint does not allege a conspiracy to deny him a fair trial, *cf. Bretz v. Kelman,* 773 F.2d 1026 (9th Cir. 1985); *Cline,* 661 F.2d 108, nor does deprivation of employment elevate his malicious prosecution claim to a constitutional violation absent some denial of due process. *Cf. Chalmers v. City of Los Angeles,* 762 F.2d 753, 756-57 (9th Cir. 1985). While his complaint was therefore properly dismissed, we cannot say that there are no circumstances under which it could not be amended to state a claim. Leave to amend should have been given.

Given reversal of the judgment dismissing the federal claims, the basis upon which the court dismissed the pendent claims no longer remains

REVERSED AND REMANDED.

Appendix B

In the United States District Court
For The Northern District Of California

James Forrester,
Plaintiff,

v.

Roland C. Dart, III, et al.,
Defendants.
[Filed May 2, 1989]

NO. C-88-2818 TEH

ORDER

This matter comes before the Court on defendants' motion for judgment on the pleadings under Rule 12(c). Having carefully considered the papers submitted and heard oral argument, the Court hereby grants the motion.

Background

This case is based on circumstances surrounding an alleged illegal arrest in January 1987 and the criminal prosecution that followed that arrest. Plaintiff James Forrester ("plaintiff") filed his complaint against defendants City of Vallejo, the city chief of police, three Vallejo police officers, and a police informant, with this Court in July 1988. He alleged illegal arrest, excessive use of force, abuse of process and malicious prosecution under Section 1983 and California law. Defendants argue that (1) plaintiff's Section 1983 claim is barred by the statute of limitations, and (2) plaintiff's pendent state claim should be dismissed since the federal claim fails. Further, defendants argue that plaintiff's state claim is fatally defective because of plaintiff's failure to plead compliance with California notice of claim requirements.

Plaintiff, an ex-police officer for the City of Vallejo, was arrested in Napa on January 7, 1987. At the time of his arrest he was in the company of Alfred E. Cruz ("Cruz"), another former Vallejo police officer, and David Michael Paiva ("Paiva"), a recently-released prisoner who plaintiff alleges the defendant

police used in an attempt to press criminal charges against Cruz.[1] According to plaintiff, the three men were on their way to see Cruz's lawyer so that he could depose Paiva regarding certain accusations made by one of the defendant/police officers against Cruz and his lawyer.[2] While Paiva's ostensible purpose was to give Cruz's lawyer his deposition, his real purpose, according to plaintiff, was to set Cruz up by inducing Cruz to sell him heroin, whereupon the police would arrest Cruz.

At some point during the ride to Napa, Cruz discovered a "bug" in Paiva's cigarette pack and realized that he was being set up. Plaintiff represents that he was unaware of the "bug". After a brief stop, plaintiff continued to drive toward Napa and the deposition. When the three men arrived in Napa, they were met by the defendant Vallejo police who ordered them to the ground at gunpoint. Cruz and plaintiff were then arrested.

Plaintiff was charged with kidnap, assault with a deadly weapon, conspiracy, robbery, grand theft and dissuading a witness. He claims that no probable cause existed for these charges. He alleges that the defendant police officers knew or should have known that Paiva was not telling the truth about plaintiff's alleged acts, but that they proceeded with the charges in the hope that plaintiff would either implicate Cruz or pressure him to enter a quilty plea. According to plaintiff, defendants agreed to reduced charges against Cruz when it became obvious during trial that Paiva's testimony lacked credibility. Cruz then pled guilty to the reduced charges and all charges against plaintiff were dismissed.

Plaintiff filed his complaint in this Court on July 18, 1988. In his Section 1983 claim, he alleged that defendant's acts constituted unlawful arrest, excessive use of force, abuse of process, and

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[1] Cruz had been discharged from the Vallejo police force the previous year after he was charged with criminal drug offenses. The criminal charges were dismissed, plaintiff alleges, because defendants improperly filed those charges. As a result, plaintiff further alleges, defendants conspired to "get" Cruz through Paiva who was clearly unreliable and willing to say and do what it took to get out of jail.

[2] Paiva had apparently reported these accusations to Cruz in a conversation which Cruz taped.

malicious prosecution in violation of the First, Fourth, Fifth, and Fourteenth Amendments and Section 1983. According to plaintiff, defendants' acts have deprived him of liberty, invaded his privacy, interfered with his right to free association, caused him loss of reputation and property, made him unable to carry on his profession,[3] caused him grievous mental suffering, and pain and suffering.

Standard

Rule 12(c) provides in pertinent part that a motion for judgment on the pleadings may be brought by any party "after the pleadings are closed but within such time as not to delay trial." Fed.R.Civ.P. 12(c). In a Rule 12(c) motion, all factual allegations by the party opposing the motion are accepted as true. The motion should not be granted unless the movant is entitled to judgment as a matter of law. 5 Wright & Miller, *Federal Practice and Procedure*, § 1368 at 690; *see McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Section 1983 claim

The applicable statute of limitations for Section 1983 claims is the particular state's statute of limitations for personal injury. *Wilson v. Garcia*, 471 U.S. 261 (1985). In California the statute of limitations for a personal injury action is one year. Cal. Code Civ.Pro. § 340(3). The tolling of the statute of limitations also follows state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-486 (1980). While state law determines the period of limitations, federal law determines when a cause of action accrues. *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981). Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action. *Id.*

a. illegal arrest, excessive force, abuse of process

Normally, a cause of action for illegal arrest, excessive force, or abuse of process would accrue on the date of the incident, since that would be the time when plaintiff knew or had reason to know

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[3] He is a private investigator.

of his injury. *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197, n.16 (3rd Cir. 1984) (causes of action for false arrest and abuse of process accrue on date of arrest); *McCune v. City of Grand Rapids*, 842 F.2d 903 (6th Cir. 1988) (concurrence) (statute of limitations begins to run on date excessive force used).

In this case, the alleged illegal arrest occurred on January 7, 1987. Therefore, the cause of action for illegal arrest, excessive use of force, and abuse of process accrued on that date, and the one-year statute of limitations for those causes of action began to run then. Since plaintiff did not file his complaint until 18 months later, on July 18, 1988, the statute of limitations had already run on these causes of action.

Plaintiff denies that the statute of limitations has run. He argues that the statute was tolled by California Government Code § 945.3, which prevents a criminal defendant from bringing a civil action for money or damages against a peace officer or the public entity employing that peace officer until related criminal proceedings against that defendant have ended. Section 945.3 specifies that the applicable statute of limitations will be tolled during the time criminal charges are pending. Therefore, plaintiff argues, the statute of limitations on his Section 1983 claim was tolled until October 22, 1987, when charges against him were dismissed, and he was well within the statute of limitations when he filed his complaint here on July 18, 1988.

However, this Court agrees with the Central District Court's decision in *Mangels v. City of Orange*, 678 F. Supp 1452 (C.D.Cal. 1988), which holds that Government Code § 945.3 does not apply to Section 1983 actions because the California statute is plainly inconsistent with two federal policies underlying Section 1983 actions. First, the *Mangels* court found Section 945.3's stay on related civil actions inconsistent with the important federal policy of ensuing Section 1983 plaintiffs immediate access to federal courts. Second, the court found that allowing such a stay to apply to Section 1983 actions until related state criminal proceedings had ended would create a dangerous potential for federal deference to state findings of fact made in those criminal proceedings. *Mangels*, 678 F.Supp at 1455. Since the court decided that a Section 1983 plaintiff was not subject to the

requirements of Section 945.3, such a plaintiff could not make use of Section 945.3's tolling clause.

Following *Mangels*, we conclude that plaintiff was not required to delay his Section 1983 claim until criminal proceedings against him were dismissed on October 22, 1987. Since he was not subject to the restriction of Section 945.3, he cannot make use of its tolling clause.

Plaintiff further argues that until his dismissal on October 22, 1987, he could not assert damages with accuracy or establish his claims, because defendants' conspiracy to deprive him of his rights and pressure him into becoming a witness against Cruz was not clear to him until his case had ended. However, the Ninth Circuit has found that the existence of a conspiracy does not generally postpone the accrual of causes of action arising from the conspirators' separate wrongs. *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984). Therefore, we conclude that plaintiff's causes of action for illegal arrest, excessive force and abuse of process accrued on the day of his arrest and their accrual was not extended by defendants' alleged conspiracy.

b. malicious prosecution

A cause of action for malicious prosecution accrues when the proceeding against plaintiff has been favorably terminated. *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981). As a general rule, the Ninth Circuit does not find malicious prosecution to be cognizable claim under Section 1983. *Id.* at 112. However, the Circuit has carved out a limited exception where the malicious prosecution is conducted with the intent of denying a person equal protection or otherwise subjecting him to a denial of constitutional rights. *Cline*, 661 F.2d at 110. In *Cline*, the Ninth Circuit found a denial of the constitutional right of liberty where plaintiff, as the result of an alleged malicious prosecution, faced the prospect of additional time in jail pending the appeal of his conviction. *Id.* at 111-112. *See also, Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc) (plaintiff spent time in jail as a result of malicious prosecution). In a later case, this Circuit found an intentional denial of equal protection when the plaintiff was held in custody for several hours, while handcuffed and subjected

to racial slurs. *Usher v. City of Los Angeles,* 828 F.2d 556 (9th Cir. 1987).

Since plaintiff has alleged no facts to indicate that he was subjected to an intentional denial of equal protection or constitutional rights through his alleged malicious prosecution, we find that plaintiff has failed to show that his malicious prosecution claim fits within the limited exception recognized in this Circuit. Therefore, we conclude that his malicious prosecution claim must fail.

Pendent state claim

When federal claims are dismissed before trial, the question whether pendent state claims should still be entertained is within the sound discretion of the district court. *Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir. 1985). Generally, dismissal of federal claims before trial dictates that the pendent state claim should be dismissed. *Id.* Since we find that plaintiff's Section 1983 claim should be dismissed, we dismiss his pendent state claims as well.

Conclusion

Plaintiff's Section 1983 cause of action fails because his claims of illegal arrest, excessive use of force, and abuse of process are barred by the statute of limitations, and his malicious prosecution claim does not fit within the exception carved out by the Ninth Circuit. Since plaintiff's federal claim fails, the Court in its discretion dismisses plaintiff's state claim.

Accordingly, and good cause appearing, IT IS HEREBY ORDERED that defendants' Rule 12(c) motion for judgment on the pleadings is granted.

IT IS SO ORDERED.

Dated: May 1, 1989

THELTON E. HENDERSON
Thelton E. Henderson
United States District Judge

United States District Court
Northern District of California

C-88-2818 TEH

James Forrester

v.

Roland C. Dartt, et al.

Judge Thelton E. Henderson

[Filed May 2, 1989]

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that defendants' motion for judgment on the pleadings is
GRANTED.

Richard W. Wieking
Clerk

Barbara Anderson
(By) Deputy Clerk
May 2, 1989

Appendix C

Supreme Court of the United States

No. A-229

ROLAND C. DART, III, et. al.,
Petitioners

vs.

JAMES FORRESTER

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 20, 1990.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of September, 1990.

Supreme Court, U.S.
FILED
FEB 26 1991
OFFICE OF THE CLERK

NO. 90-810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

ROLAND C. DART, III, JIM JAKSCH, ROBERT LEWIS, THOMAS HAUSER and CITY OF VALLEJO,

Petitioners,

v.

JAMES FORRESTER,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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JAMES FORRESTER

QUESTIONS PRESENTED

1. Whether California Government Code Section 945.3 which tolls the statute of limitations for civil actions against a peace officer and the public entity employing the peace officer while criminal charges are pending is applicable to federal civil rights actions filed pursuant to 42 U.S.C. section 1983.

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On Petition for a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

State Tolling Provisions Govern 42 U.S.C. Section 1983 Actions Unless Inconsistent With Federal Policy or the Goals of the Civil Rights Statutes

Congress provided no federal statute of limitations or tolling scheme for 42 U.S.C. section 1983 claims. Instead, 42 U.S.C. section 1988 provides that where a civil rights statute is

> deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause...

Because no federal statute of limitation governs, "the length of the limitations period and closely related questions of tolling and application are to be governed by state law." Wilson v. Garcia 471 U.S. 261, 271 (1985).

Courts must necessarily apply state

tolling provisions with the understanding that:

> [a]ny period of limitation.... is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of state ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-464 (1975).

State tolling provisions are "more than a technical obstacle to be

circumvented if possible. In most cases they are binding rules of law." Board of Regents of the University of the State of New York v. Tomanio 446 U.S. 478, 483-484 (1979). As this Court has acknowledged, there is nothing "peculiar to a federal civil rights action to justify special reluctance in applying state law. Indeed, the express terms of 42 U.S.C. 1988 suggest that the contrary is true." Johnson v. Railway Express Agency, Inc., supra. at 464.

The chief goals of 42 U.S.C. Section 1983 are compensation and deterrence. Its subsidiary goals are the promotion of uniformity and federalism. Hardin v. Straub 490 U.S. 536, 109 S.Ct. 1998 (1989) citing Board of Regents v. Tomanio, supra. at 488-492.

Recently, this Court has held that a state statute which tolled the statute

of limitations for Section 1983 actions by prisoners during incarceration was consistent with the remedial goals of Section 1983. Hardin v. Straub, supra. at 538. This Court has acknowledged:

> a federal interest in disposing of all litigation in the federal courts as expeditiously as possible. But the interest in prompt resolution of disputes is vindicated by all statutes of limitations and always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits. Although there is no reason why Congress could not strike that balance in Section 1983 cases by enacting a federal statute of limitations, it has not done so. Rather....it has tacitly approved of the practice of relying on state legislatures to balance these conflicting interests. Thus the interest in prompt adjudication cannot properly be characterized as a separate interest that is "inconsistent" with Michigan's tolling provision; rather, it is one of the interests that Michigan has weighed in arriving at the limitations policy that federal courts must borrow. Id. at 538 n. 10.

Other Federal laws and legislation indicate that a provision which reasonably delays bringing a civil rights action for damages but in no way deters the bringing of such an action does not necessarily frustrate the purposes of the civil rights statutes.[1]

This Court has held that no federal policy prevents a civil rights plaintiff from benefiting from a tolling provision

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[1] In enacting 42 U.S.C. Section 1997 Congress directed that a court may continue a case for up to 90 days to permit a prisoner to exhaust available administrative remedies which have been certified as adequate by the State's Attorney General.

Federal tolling provisions also permit delay in filing actions arising out of a prosecution of the Clayton Act. It provides that "whenever any.... criminal prosecution is instigated by the United States to....punish violations of any of the anti-trust laws the statute of limitations for a private right of action shall be tolled during the pendency of the prosecution and one year." American Pipe and Construction Co. v. Utah 414 U.S. 538, 560 (1974).

simply because he or she is not subject to its disabilities. Chardon v. Fumero Soto 462 U.S. 650, 657 (1983). (state tolling provision restarts statute of limitations period for individuals, even unnamed plaintiffs, when a class fails to be certified does not offend any federal policy of deterrence, compensation, uniformity or federalism).

Considerations of federalism are quite appropriate in adjudicating federal suits based on Section 1983. Board of Regents v. Tomanio, supra at 492 citing Younger v. Harris, 401 U.S. 37 (1971) The policy against federal court interference with state criminal proceedings is based in part on the idea of comity, "that is, a proper respect for state functions." Younger v. Harris, supra at 44. Circumstances justifying an exception to the Younger doctrine are

extremely rare. Kegler v. Helfant 421 U.S. 117, 123-126 (1975) This is especially true where federal court relief could prejudice the conduct of the trial on the merits. Stefanelli v. Minard 342 U.S. 117 (1951). Application of the State provision which tolls the statute of limitations for filing suit against a peace officer while criminal charges are pending is consistent with principles of federalism.

Cal.Gov.Code Section 945.3 is Consistent With Federal Policy and the Goals of the Civil Rights Statutes

One of the State Legislature's purposes underlying Section 945.3 was to eliminate the use of civil damage complaints as plea bargaining levers. McAlpine v. Superior Court 209 Cal.App.3d 1, 1 (1989). Another purpose was to prevent the use of civil discovery

statutes to inquire into prosecutorial materials and investigative information while criminal charges are pending. Mohlmann v. City of Burbank 179 Cal.App.3d 1037, 1042 (1986). It is important to note that Section 945.3 is very narrowly tailored to achieve these substantive state policies. It only prohibits actions for money or damages during initial criminal proceedings. It does not delay access to federal court by a criminal defendant seeking equitable relief. It specifically permits claims to be filed during appeals and thus does not require a final resolution of all criminal matters relating to a claim. McAlpine v. Superior Court, supra at 1.

Conversely, Section 945.3 provides the same protection to potential civil rights plaintiffs while they are facing prosecution. As a practical matter, plea

negotiations are a two way street. A person facing criminal prosecution may be reluctant to bring a lawsuit against those who may influence or affect the outcome of the investigation and prosecution, including potential witnesses. As the Ninth Circuit pointed out, Section 945.3 serves the independent policy objective of encouraging a criminal defendant to await the outcome of the criminal action before filing suit by extending the filing period. Harding v. Galceran 889 Fed.2d 906, 909 (9th Cir 1989.)

Where an official's misconduct is ongoing, the tolling of the limitations period during pending criminal proceedings would have a deterring effect on that person's misconduct. Relief from the burden of prosecution would enhance the ability of a person to bring a

Section 1983 action and seek compensation for violations of constitutional rights. In this way the delay contemplated by Section 945.3 would advance and not impede Section 1983's chief goals of compensation and deterrence. Id. at 909.

Much in the same way that the filing of a lawsuit might give a defendant access to prosecutorial materials, the filing of a civil rights complaint could entitle a prosecuting entity to a defendant's statements and other discovery, which may compromise the defendant's constitutional rights.

California's tolling provision permits a criminal defendant time to gauge the full extent of any constitutional violations as well as state causes of action. It allows him or her time to prepare a civil rights action and to deal with the responsibilities

which immediately follow filing a complaint. Burnett v. Grattan 468 U.S. 42, 50 (1983).[2]

California Government Code Section 945.3 is not only consistent with the important goals of the Civil Rights Act, but actually promotes its major remedial goals. It fosters the ability and willingness of a plaintiff to seek

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[2]. This Court has stated that state law is not "appropriate if it fails to take into account the practicalities that are involved in litigating federal rights claims and policies that are analogous to the goals of the Civil Rights Acts." These practicalities are based on getting the claimant into court. They include, the preparation involved, the requirement that an injured person must recognize the constitutional dimensions of his injury, and the ability to undertake discovery. The Court also pointed out that the administration of justice is not well served by the filing of premature, hastily drawn complaints. Burnett v. Grattan, supra 468 U.S. at p. 50, n. 13, a case concerning limitations periods applicable to civil rights suits.

redress of constitutional violations once the threat of pending prosecution has ended. Harding v. Galceran supra. at 909 The limited definition of what constitutes a "pending" prosecution may create a reasonable delay but in no way deters access to a federal forum for a claim for compensation for violation of civil rights. It has virtually no effect on a suit for equitable relief where constitutional violations overcome the strong federal policy against intervention in state judicial proceedings. In addition, Section 945.3 defers to the state legislature's underlying goals as mandated by 42 U.S.C. Section 1988.

California Government Code Section 945.3 is a Tolling Provision Which Applies to 42 U.S.C. Section 1983 Actions

Petitioner contends that California

Government Code Section 945.3 is an "anti-mischief statute" and not a tolling statute and is therefore not applicable to plaintiff's 1983 action. (Pet.App. p.6) Section 945.3 speaks for itself:

> No person charged by indictment, information complaint or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer...while the charges against the accused are pending....Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending...

Cal. Government Code Section 945.3 contains no language limiting its scope to state law claims. Mangels v. City of Orange 678 F.Supp. 1452, 1454 (C.D. Cal. 1988). This provision and underlying purposes clearly applies to any action against a peace officer while criminal

charges are pending. [T]he one year statute of limitations period applied to Section 1983 claims in California is interrelated to the policies behind the tolling provision expressed in Section 945.3." Harding v. Galceran supra at 908.

Simply characterizing this tolling provision as an "anti-mischief statute" cannot alter its function nor exempt it from federal law which mandates its application to Section 1983 suits.

Petitioner contends (Pet. 7) that Section 945.3 is inconsistent with Section 1983 because it was designed to limit liability whereas Section 1983 was designed to remedy civil rights, citing Williams v. Horvath 16 Cal.3d 834, 842 (1976). However, Williams v. Horvath concerned California's 100 day Notice of Claim requirement contained in Cal.

Government Code Section 911.2 which did indeed limit liability by providing an inordinately short time to file a claim against a public entity. Further, unlike limitations and tolling schemes, notice of claim rules are not indispensable prerequisites to litigation such that Congress intended federal courts to borrow applicable state law under Section 1988. Felder v. Casey 487 U.S. ___, 108 S.Ct. 2302, 2308 (1988). On the contrary, Cal. Government Code Section 945.3 explicitly extends the filing period for civil rights suits, enhancing the ability for a civil rights plaintiff to seek redress for constitutional violations.

Petitioners also argue (Pet. 6) that the Ninth Circuit ignored the sound reasoning of the California District court in Mangels v. City of Orange 678

F.Supp. 1452 (C.D. Cal. 1988.) The Court in Mangels held that Cal. Government Code ection 945.3 is inconsistent with two federal policies underlying the Civil Rights Act. The first is a requirement of "immediate access to the federal courts..." The second is a preference for federal as opposed to state fact-finding processes. Id. at p. 1455 citing Patsy v. Florida Board of Regents, 457 U.S. 496, 504 - 506.

Mangels is based on cases which decided that federal civil rights plaintiffs are not required to exhaust state administrative remedies as a prerequisite for bringing a Section 1983 action. Mangels failed to distinguish between a tolling provision and an exhaustion requirement, and failed to analyze differences between criminal and administrative proceedings. As a result

the decision in Mangels erroneously concluded that Section 945.3 is inconsistent with the policies underlying the Civil Rights Acts.

The California District Court reasoned that any delay in access to federal court was inconsistent with the goals of Section 1983 and therefore impermissible. This notion was based on the assumption that federal policy directs that findings of fact made in state **criminal proceedings** may not apply to federal civil rights claims. "By requiring resolution of related criminal charges prior to bringing a civil action, Section 945.3 creates a potential for deference to findings of fact made in the state criminal proceedings." Mangels v. City of Orange supra. at 1462.

According to Mangels, federal policy requires "entrusting the fact finding

process to a forum perceived by the 1871 Congress to be better insulated from local prejudice." Id.[3]

In the context of a criminal prosecution, this Court has specifically held that facts adjudicated during state criminal proceedings may be used in subsequent civil rights actions without contravening the policies of Section 1983.

> "[N]othing in the language of section 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. section 1738. And nothing in

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[3] Mangels relied upon the decision in Patsy acknowledging that the 1871 Congress may not have felt such concern over state fact finding today so it looked to the legislative intent in passing 1997(e) which clearly indicated that Congress did not intend plaintiffs to exhaust administrative remedies before filing 1983 civil suits. Patsy v. Florida Board of Regents supra. at p. 507.

> the language or legislative history of section 1983 proves any congressional intent to deny binding effect to a state-court judgement or decision when the state court acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of section 1983 reveals any purpose to afford less deference to judgments in state criminals proceedings than to those in state civil proceedings. There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court because the issue arose in a state proceeding in which he would rather have not been engaged at all." (footnote omitted) Allen v. McCurry 449 U.S. 90, 103-104 (1980).

Administrative proceedings and criminal proceedings must be distinguished. Strong federal law and policy constrains federal interference

with state criminal justice proceeding. Younger v. Harris supra. at 44. The Constitution safeguards persons and procedures within the criminal justice system. No such federal policy or law protects state administrative procedures and no federal law, such as Section 1988, mandates their application to federal civil rights claims. Thus the decision in Mangels that "no basis exists for treating Section 945.3 differently in this respect than other exhaustion requirement." is incorrect. Mangels v. City of Orange, supra at 1455.

The issue of state criminal courts adjudicating facts pertinent to federal civil rights claims has been decided. A state may make findings of fact which may then apply to subsequent civil rights actions without contravening the policies of Section 1983. Allen v. McCurry, supra

at p. 97-98. Thus the California District Court decision that the tolling provisions of Cal.Government Code Section 945.3 is inconsistent with federal civil rights statutes is clearly meritless. The Ninth Circuit has properly decided the questions at issue in the Petition for Writ of Certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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